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UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA  
EASTERN DIVISION

|                      |   |                              |
|----------------------|---|------------------------------|
| DELORIES LESTER      | ) | Case No. EDCV 06-00360-MLG   |
|                      | ) |                              |
| Plaintiff,           | ) | MEMORANDUM OPINION AND ORDER |
|                      | ) |                              |
| v.                   | ) |                              |
|                      | ) |                              |
| JO ANNE B. BARNHART, | ) |                              |
| Commissioner of the  | ) |                              |
| Social Security      | ) |                              |
| Administration,      | ) |                              |
|                      | ) |                              |
| Defendant.           | ) |                              |
|                      | ) |                              |

Plaintiff Delories Lester seeks judicial review of the Commissioner's final decision denying her application for Social Security Disability Insurance Benefits("DIB"). For the reasons stated below, the Commissioner's decision is affirmed and this action is dismissed with prejudice.

**I. Factual and Procedural Background**

Plaintiff was born on August 29, 1958, and has a high school education. (Administrative Record ("AR") 11.) She has worked as a home

1 attendant, cashier, sales clerk, and bus driver. (Id.) On September 23,  
2 2003, Plaintiff filed an application for DIB, claiming an onset  
3 disability date of September 5, 2001, due to a crushed right foot, back  
4 injury, and asthma.<sup>1</sup> (Id.)

5 The Commissioner denied Plaintiff's application initially and upon  
6 reconsideration. (AR 22-25, 27-31.) Plaintiff timely filed a Request for  
7 Hearing, and a hearing was held on June 14, 2005, before Administrative  
8 Law Judge ("ALJ") Larry Parker. (AR 232.) Plaintiff was insured only  
9 through December 31, 2003, thus the ALJ was required to determine  
10 whether Plaintiff was disabled prior to that date. (AR 11.)

11 The ALJ found that Plaintiff was not disabled during any portion of  
12 the relevant time period. The ALJ made specific findings that  
13 Plaintiff's asthma is not "severe" within the meaning of the Social  
14 Security Regulations; Plaintiff suffers from right foot arthritis and  
15 degenerative disc disease of the lumbar spine, and both impairments are  
16 severe under the regulations; Plaintiff's severe impairments do not meet  
17 or equal any of the listed impairments in the regulations; Plaintiff  
18 retains a residual functional capacity that allows her to perform her  
19 past work as a cashier and sale clerk; and, accounting for Plaintiff's  
20 exertional limitations, "there are a significant number of jobs in the  
21 national economy that she could perform." (AR 19.)

22 Plaintiff timely filed a Request for Review of the ALJ's decision.  
23 The Appeals Council denied review on March 4, 2006. (AR 3-5.) Plaintiff

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24 <sup>1</sup> Plaintiff previously filed an application for benefits on  
25 February 28, 1995, alleging a February 14, 1995, disability onset date.  
26 The Commissioner denied Plaintiff's application on April 13, 1995, and  
Plaintiff did not appeal the decision.

27 Plaintiff again filed for DIB and Supplemental Security Income  
28 benefits on June 21, 2002, alleging a March 1, 2002, disability onset  
date. The Commissioner denied the application on December 19, 2002,  
which Plaintiff did not pursue. (AR 10.)

1 filed the instant action on April 5, 2006, raising two claims of error:  
2 1) the ALJ improperly discredited the opinion of a treating podiatrist;  
3 and 2) the ALJ erred by failing to incorporate the podiatrist's opinion  
4 into the hypothetical question posed to the vocational expert. (Jt.  
5 Stip. 2.)

## 6 7 **II. Standard of Review**

8 Under 42 U.S.C. § 405(g), a district court may review the  
9 Commissioner's decision to deny benefits. The Commissioner's or ALJ's  
10 findings and decision should be upheld if "if it is supported by  
11 substantial evidence and based on the application of correct legal  
12 standards." *Sandgathe v. Chater*, 108 F.3d 978, 980 (9th Cir. 1997)  
13 (quoting *Andrews v. Shalala*, 53 F.3d 1035, 1039 (9th Cir. 1995)).  
14 Substantial evidence means such evidence as a reasonable person might  
15 accept as adequate to support a conclusion. *Richardson v. Perales*, 402  
16 U.S. 389, 401 (1971); *Widmark v. Barnhart*, 454 F.3d 1063, 1066 (9th Cir.  
17 2006). It is more than a scintilla, but less than a preponderance.  
18 *Robbins v. Soc. Sec. Admin.*, 466 F.3d 880, 882 (9th Cir. 2006). To  
19 determine whether substantial evidence supports a finding, the reviewing  
20 court "must review the administrative record as a whole, weighing both  
21 the evidence that supports and the evidence that detracts from the  
22 Commissioner's conclusion." *Reddick v. Chater*, 157 F.3d 715, 720 (9th  
23 Cir. 1996). "If the evidence can support either affirming or reversing  
24 the ALJ's conclusion," the reviewing court "may not substitute its  
25 judgment for that of the ALJ." *Robbins*, 466 F.3d at 882.

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1 **III. Discussion and Analysis**

2 On September 5, 2001, a bus rolled over Plaintiff's right foot. (AR  
3 121.) X-rays did not reveal a fracture or other bone or joint  
4 abnormality, and she was diagnosed with a foot contusion and abrasion.  
5 (AR 12, 118-20.) Beginning in January 2003, Plaintiff was treated for  
6 this injury by Raymond Tsukuda, Doctor of Podiatric Medicine, at the  
7 Loma Linda Foot and Ankle Center.<sup>2</sup> On October 21, 2003, Dr. Tsukuda  
8 completed a Primary Treating Physician's Permanent and Stationary Report  
9 as part of Plaintiff's Workers' Compensation claim. In a section asking  
10 the physician to describe "all preclusions or restrictions related to  
11 work activities," Dr. Tsukuda reported that Plaintiff should not stand  
12 for longer than 30 minutes at a time; should not walk for longer than 30  
13 minutes; should not lift objects greater than 10 pounds; should not make  
14 repetitive movements with her feet; and should not perform repetitive  
15 bending. (AR 184.)

16 The ALJ took note of Dr. Tsukuda's specific findings regarding  
17 Plaintiff's physical limitations, but found his opinion "neither  
18 persuasive nor controlling," stating:

19 [H]is opinions are not well supported; those extreme  
20 limitations are not backed by citations to medical signs and  
21 laboratory results as required by SSR 96-4p. Indeed, Dr.  
22 Tsukuda reports an essentially normal examination throughout  
23 2003, with the exception of decreased sensation in the right  
24 foot on September 12, 2003. This is a subjective finding, and  
25 in view of the claimant's significant pain behavior in Dr.  
26 Pang's office on March 8, 2002, the credibility of her

27  
28 <sup>2</sup> Licensed podiatrists such as Dr. Tsukuda are acceptable medical  
sources. 20 C.F.R. § 404.1513(a)(4).

1 subjective complaints is negligible. While Dr. Tsukuda is an  
2 acceptable medical source, his expertise is limited to the foot  
3 and ankle. Consequently, his opinions about the claimant's  
4 ability to lift and bend cannot be considered to be those of a  
5 treating physician, although they have been taken into account.  
6 (AR 15) (citations omitted). The ALJ did not incorporate the  
7 limitations described in Dr. Tsukuda's report in the hypothetical  
8 questions posed to the vocational expert.

9 Plaintiff claims that the ALJ improperly rejected Dr. Tsukuda's  
10 opinion, focusing on two of the ALJ's stated reasons for doing so: 1)  
11 Plaintiff contends that, given the ALJ's conclusion that Dr. Tsukuda's  
12 opinion is "not backed up by medical signs and laboratory results," the  
13 ALJ had a duty under 20 C.F.R. § 404.1512(e)(1) to request additional  
14 information for Dr. Tsukuda, clarifying his opinion; and 2) Plaintiff  
15 argues that the ALJ erred by finding that Dr. Tsukuda, a podiatrist,  
16 lacked the expertise to opine on Plaintiff's ability to lift and bend.

17 It is the responsibility of the ALJ to resolve conflicts and  
18 ambiguities in the medical record and determine credibility. *Meanel v.*  
19 *Apfel*, 172 F.3d 1111, 1113 (9th Cir. 1999); *Andrews v. Shalala*, 53 F.3d  
20 1035, 1039 (9th Cir. 1989). Thus, the ALJ determines which medical  
21 opinions should be given the most weight. As a general rule, a treating  
22 medical source's opinion as to the nature and severity of an impairment  
23 must be given controlling weight if the opinion is well supported and  
24 not inconsistent with other substantial evidence. Social Security Ruling  
25 96-2p. The ALJ may reject the opinion of a treating medical source if  
26 the ALJ provides specific and legitimate reasons for doing so that are  
27 based on substantial evidence in the record. *Bayliss v. Barnhart*, 427  
28 F.3d 1211, 1216 (9th Cir. 2005); *Lester v. Chater*, 81 F.3d 821, 830-31

1 (9th Cir. 1996); *Murray v. Heckler*, 722 F.2d 499, 502 (9th Cir. 1983).  
2 Nevertheless, the ALJ need not accept the opinion of any medical source,  
3 including a treating medical source, "if that opinion is brief,  
4 conclusory, and inadequately supported by clinical findings." *Bayliss*,  
5 427 F.3d at 1216; *Thomas v. Barnhart*, 278 F.3d 947, 957 (9th Cir. 2002);  
6 accord *Tonapetyan v. Halter*, 242 F.3d 1144, 1149 (9th Cir. 2001). In  
7 addition, if the opinion of a non-treating source is based upon  
8 independent clinical findings that differ from those of the treating  
9 medical source, the opinion of the non-treating source may itself be  
10 substantial evidence on which the ALJ may rely. *Andrews*, 53 F.3d at  
11 1041.

12 The ALJ rejected Dr. Tsukuda's October 21, 2003 report because it  
13 lacked support in the Dr. Tsukuda's previous medical reports. Beginning  
14 in January 2003, when Dr. Tsukuda first examined Plaintiff, he noted  
15 "mild edema" and "mild discomfort" and tenderness in Plaintiff's right  
16 foot. (AR 158, 162, 164.) On February 14 there was "minimal edema" and  
17 "non-specific" pain in the right foot. (AR 166.) On February 28, Dr.  
18 Tsukuda noted, "The right foot sprain is improving." (AR 169.) By March  
19 28, Dr. Tsukuda repeatedly reported "no edema" and, by April 25, "a good  
20 range of motion" in the right foot. (AR 170, 172, 174.) Dr. Tsukuda also  
21 reported that Plaintiff was able to walk into the office on her own. (AR  
22 158, 162, 164, 166, 170, 172, 174.)

23 The ALJ did not err in concluding that Dr. Tsukuda's examination  
24 record lacked the objective support for the severe limitations described  
25 in the October 21 report. Dr. Tsukuda's progress notes not only lack the  
26 type of clinical findings to support the report, his notes describe  
27 Plaintiff's condition in a way that is inconsistent with the limitations  
28 listed in the report. Moreover, the October 21 report contains no new

1 findings that would cause such severe physical limitations.

2       Indeed, Plaintiff does not point to any clinical findings in  
3 support of Dr. Tsukuda's October 21 report. (Jt. Stip. 2-5.) Instead,  
4 Plaintiff argues that, if the ALJ was concerned about the absence of  
5 medical support for Dr. Tsukuda's report, the ALJ had a duty under 20  
6 C.F.R. § 404.1512(e)(1) to contact Dr. Tsukuda to obtain additional  
7 information. The relevant portion of the regulation states: "When the  
8 evidence we receive from your treating...medical source is inadequate  
9 for us to determine whether you are disabled," the Commissioner "will  
10 recontact your treating...medical source to determine whether the  
11 additional information we need is readily available." 20 C.F.R. §§  
12 404.1512(e), (e)(1).

13       This is not a case where the treating medical source's records were  
14 inadequate. Dr. Tsukuda provided thorough progress notes over the  
15 relevant time period. There were no gaps or ambiguities in the record  
16 that would trigger the ALJ's duty to supplement under section  
17 404.1512(e). *See, e.g., Widmark v. Barnhart*, 454 F.3d 1063, 1069 (9th  
18 Cir. 2006); *Webb v. Barnhart*, 433 F.3d 683, 687 (9th Cir. 2005). As  
19 discussed above, the record provided sufficient support for the ALJ's  
20 decision to reject Dr. Tsukuda's opinion; therefore the ALJ did not have  
21 a duty to recontact him. *Bayliss*, 427 F.3d at 1217.

22       Plaintiff also contends that the ALJ erred by finding that Dr.  
23 Tsukuda lacked the expertise to issue an opinion concerning Plaintiff's  
24 lifting and bending limitations. Plaintiff's contention lacks merit for  
25 two reasons. First, the dearth of medical findings provide a specific  
26 and legitimate reason for discounting Dr. Tsukuda's opinion. The ALJ  
27 need not provide an additional basis for rejecting Dr. Tsukuda's  
28 opinion. Second, Dr. Tsukuda is an acceptable medical source "for

1 purposes of establishing impairments of the foot, or foot and ankle  
2 only...." 20 C.F.R. § 404.1513(a)(4). Plaintiff provides no support for  
3 her contention that a podiatrist's expertise as a medical source extends  
4 to opinions about lifting and bending. The Court finds that the ALJ did  
5 not err in rejecting Dr. Tsukuda's opinion regarding Plaintiff's ability  
6 to lift and bend.

7 Finally, Plaintiff claims that the ALJ erred by failing to  
8 incorporate Dr. Tsukuda's opinion, as contained in the October 21, 2003  
9 report, into the hypothetical posed to the vocational expert. "In order  
10 for the testimony of a VE [vocational expert] to be considered reliable,  
11 the hypothetical posed must include 'all of the claimant's functional  
12 limitations, both physical and mental' supported by the record."  
13 *Thomas*, 278 F.3d at 956 (quoting *Flores v. Shalala*, 49 F.3d 562, 570-71  
14 (9th Cir. 1995)). Because the ALJ did not err in finding that Dr.  
15 Tsukuda's medical opinion was not supported by the record, the ALJ did  
16 not err in omitting Dr. Tsukuda's opinion from the hypothetical posed to  
17 the vocational expert.

#### 18 19 **IV. Conclusion**

20 Accordingly, **IT IS HEREBY ORDERED** that the decision of the  
21 Commissioner is **AFFIRMED. IT IS FURTHER ORDERED** that the Clerk of the  
22 Court serve copies of this Order and the Judgment herein on all parties  
23 or their counsel.

24  
25 DATED: January 17, 2007

**/S/ Marc L. Goldman**

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MARC L. GOLDMAN  
United States Magistrate Judge